

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOHN S. EVERETT**  
Claimant

VS.

**STATE OF KANSAS**  
Respondent  
Self-Insured

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Docket No. 184,121

**ORDER**

The claimant requests review of the Preliminary Hearing Orders of Administrative Law Judge Floyd V. Palmer entered in this proceeding on July 14, 1995.

**ISSUES**

By two separate Orders the Administrative Law Judge denied claimant's request for vocational rehabilitation assessment, temporary total disability and medical benefits. In one of the orders the Administrative Law Judge found that claimant did not sustain personal injury by accident arising out of and in the course of employment with the respondent. The claimant requests a review of that finding. The respondent and State Self-Insurance Fund filed a motion to dismiss this review upon the grounds that claimant failed to timely file his brief with the Appeals Board. These are the issues now before this Board.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and for purposes of preliminary hearing, the Appeals Board finds as follows:

For the reasons expressed below, the Preliminary Hearing Orders of the Administrative Law Judge should be affirmed.

(1) The respondent's Motion to Dismiss this review must be denied. Although the Appeals Board requested briefs from both parties to assist the Board in its review, the Appeals Board lacks the authority to dismiss a proceeding when a party fails to comply with the request. Presently neither statute nor rule exists that empowers the Appeals Board to dismiss a proceeding for failure to file a brief.

(2) Under K.S.A. 44-534a, the Appeals Board has jurisdiction to review a preliminary hearing finding whether the claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent. Claimant alleges he has aggravated a pre-existing back problem, his diabetes, and a pre-existing heart problem as a result of sitting in and driving a vehicle with a defective seat. Claimant alleges an ongoing injury commencing September 23, 1993 and continuing through the present. Although claimant was requesting vocational rehabilitation and temporary total disability benefits, at the time of preliminary hearing claimant was continuing to work for the Kansas Neurological Institute as a safety security officer.

In proceedings under the Workers Compensation Act the burden is placed upon the claimant to prove by a preponderance of the credible evidence the various conditions upon which claimant's rights depend. K.S.A. 44-501(a). See also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993). The provisions of the Workers Compensation Act shall be applied impartially to both employers and employees. K.S.A. 44-501(g). In determining whether claimant has satisfied his burden of proof, the trier of fact shall consider the whole record.

The evidence fails to establish that claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent. Neither claimant's testimony nor the medical evidence is persuasive that claimant has sustained either an injury or an aggravation of any of his pre-existing conditions. At best, the evidence indicates claimant may be experiencing temporary discomfort in his back that can be alleviated by using a lumbar pillow or rolled towel for lumbar support, or by intermittently stretching when he is required to sit in his vehicle for an extended period of time. The facts fail to establish that claimant has sustained personal injury by accident arising out of and in the course of his employment with the respondent.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Orders of Administrative Law Judge Floyd V. Palmer entered in this proceeding on July 14, 1995, should be, and hereby are, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Cheryl D. Myers, Topeka, Kansas  
Kathryn D. Myers, Topeka, Kansas  
Floyd V. Palmer, Administrative Law Judge  
Philip S. Harness, Director